SUPREME COURT, U. S.

JUL 27 1967

JOHN F. DAVIS, CLERK

No. 424

Supreme Court Of The United States

JESSE TAYLOR, JR. - - - - Petitioner

vs.

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

JESSE TAYLOR, JR. - - - - - - *Petitioner*

vs.

COMMONWEALTH OF KENTUCKY - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, Jesse Taylor, Jr., by counsel, petitions this Honorable Court for the issuance of a Writ of Certiorari to review the judgment of the Court of Appeals of Kentucky, entered May 5, 1967, denying petitioner's motion for rehearing of original opinion entered February 10, 1967, by said court. Petitioner was found guilty of indecent and immoral practices and sentenced to five years by the Jefferson Circuit Court, Criminal Division, Louisville, Kentucky, and appealed that judgment to the Kentucky Court of Appeals.

Petitioner, now, for the first time, seeks relief from the Supreme Court of the United States.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC, Section 1257 (3). The Commonwealth of Kentucky has violated and infringed upon the rights, privileges and immunities of the petitioner as set forth in and guaranteed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Does the trial court's action in fining counsel twice before the jury and also reprimanding counsel before the jury deny the petitioner effective counsel?

2. The fining of and reprimanding of counsel, being a constitutional matter rather than a evidentiary matter, is this issue waived because counsel did not properly object and preserve the record in the lower court?

Did the conduct of the court prevent counsel from preserving the record for appellate review and is this not a violation of the doctrine set in Gideon v. Wainwright, 372 U.S. 335?—i.e. did not the court's conduct prevent the defendant from having "effective counsel"?

Where the highest state court admits that "the court's conduct, particularly the fining of the attorney in the presence of the jury, may have created an atmosphere so unfavorable to appellant as to have constituted reversible error, provided the question had been preserved for appellate review"; is this not a violation of the Gideon v. Wainwright Doctrine, supra, and a denial to petitioner of effective counsel?

Where it was impossible for petitioner to preserve the record due to the conduct of the court, is this not a denial of equal protection of the law to petitioner?

Where the state's highest court admits the conduct of the court may have created an unfavorable atmosphere for the petitioner, is this not a denial of equal protection of the law?

Did the court's conduct deny petitioner a fair and impartial trial as provided in the due process clause of the 14th Amendment? Did the conduct of the court in fining counsel twice and reprimanding counsel in front of the jury prejudice petitioner and deny him due process and a fair and impartial trial?

STATUTES INVOLVED

1. The Fifth Amendment to the Constitution of the United States, transposed into the Fourteenth Amendment.

2. The Sixth Amendment to the Constitution of the United States, transposed into the Fourteenth Amendment.

STATEMENT

This case originated in the First Division Criminal Branch of the Jefferson Circuit Court. The defendant was charged with indecent and immoral practices and received a five year sentence. The highest court in Kentucky affirmed the lower court, denied a motion for a rehearing and now petitioner seeks certiorari to this court.

FACTS

The court during the course of the trial fined counsel twice and reprimanded counsel in front of the jury. Counsel did not object to court's conduct during the trial. On a motion for a new trial counsel listed in his motion that the court should have declared a mistrial but failed to state reasons. The Kentucky Court of Appeals in this opinion, Taylor v. Commonwealth, Ky. 413 S.W. 2d 615, stated that the conduct of the court may have created an atmosphere so unfavorable to appellant as to have constituted reversible error, but the question had not been preserved for appellate review.

The facts leading up to the difficulty the attorney had with the judge are as follows:

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CROSS EXAMINATION BY MR. KAPLAN

Q. Mrs. Taylor, what time of day or night was this?

A. I couldn't tell you exactly.

Q. Was it in the morning or evening or afternoon?

A. I couldn't tell you exactly. It was late at night is all I know.

MR. FLEMING: If the Court please, she hasn't said—

THE COURT: Wait a minute now—(gavel strike).

MR. FLEMING: He hasn't even said when he was talking about. She's talking about going up to the police station.

WITNESS: I never looked at the clock.

MR. KAPLAN: You don't know what you're talking about, do you?

THE COURT: Just a minute (repeated gavel strikes).

MR. KAPLAN: Well, let me ask you—

THE COURT: (repeated gavel strikes) I'll do the talking now, Mr. Kaplan. Collect a twenty dollar fine for contempt from Mr. Kaplan, Mr. Sheriff.

THE COURT: Now, Mrs. Taylor, which time are you talking about, the time you went to take out the warrant or the time this incident happened? Mr. Kaplan, which do you want to know?

MR. KAPLAN: Judge, if I had the opportunity to ask the question.

THE COURT: Then ask the question instead of making a speech. Ask the question.

MR. KAPLAN: I asked the question but you pounded on the gavel so much she didn't have a chance to listen.

THE COURT: (gavel strike) Another twenty dollar fine for Mr. Kaplan. Now, ask the question.

After the trial counsel filed a motion for a new trial and contended that the court should have declared a mistrial; however, the Kentucky Court of Appeals in their decision held this was not specific enough. Taylor v. Commonwealth of Kentucky, 413 S.W. 2d 615. (Citation of case at bar).

The Kentucky Court of Appeals in their decision upheld the lower court mainly due to appellant not properly preserving the record for appellate review.

In other words, the court indicated that had the matter been preserved for appellate review then the case would have been reversed.

We are contending the conduct of the court was not of an evidentiary nature but of a constitutional nature and the preservation of the record is not mandatory. Clearly the conduct of the court deprived petitioner of a fair trial. The court in its decision cited the case of Merritt v. Commonwealth of Kentucky, 386 S.W. 2d 727 where the trial court was condemned for attacking counsel and held that the appellant was not given a fair trial; ironically, it was the same judge in the Merritt case as in the case at bar.

Counsel after his trouble with the court was in a helpless position. He was not in a position to object any more or say anything. How could he? The judge had already fined him twice, had pounded his gavel numerous times, had reprimanded counsel, and had certainly prejudiced the jury against counsel and petitioner. If counsel would have done anything else he would have gone to jail or created further prejudice to the petitioner.

The conduct of counsel was not improper, he was merely giving effective representation to the petitioner. He was not acting improperly; however, the court became impatient and disturbed. In fact, the court was so disturbed that it fined counsel forty dollars while Kentucky law limits the courts power to fine counsel to thirty dollars. Even here, the court acted improperly and exceeded its jurisdiction.

HOW FEDERAL QUESTIONS WERE RAISED

The Constitution of the United States guarantees individuals certain protections which include right to counsel, equal protection of the law and due process of law.

In numerous situations the Supreme Court of the United States has deemed certain types of conduct so unfair as to violate the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The court has held where such unfairness has caused identifiable prejudice or where the facts reveal the conduct complained of involves such a probability that prejudice will result then this is a denial of due process. The court held in Turner v. Louisiana, 379 U.S. 466, that a jury cannot be subjected to possible influences or prejudicial associations during a criminal trial. In this case, the court questioned the conduct of the sheriff. Also, the court has held that the televising of a trial had a prejudicial influence on a jury—See Estes v. Texas, 381 U.S. 532. This in itself was so inherently prejudicial that the court reversed the conviction. Other important cases on this point are Tumey v. Ohio, 273 U.S. 310, Moore v. Dempsey, 261 U.S. 86, Alcorta v. Texas, 355 U.S. 28.

Bollenbach v. United States, 326 U.S. 607, and Wilson v. United States, 250 F. 2d 312 hold:

> "So deeply ingrained is the tradition that it is well settled that the trial judge must not only be totally indifferent as between the parties, but he must also give the appearance of being so. He must scrupulously avoid any conduct on his part which may give the appearance or impression that he is not totally unbiased. Such an appearance or impression may fatally infect the proceedings notwithstanding the fact that the Court is in truth and in fact completely impartial and detached."

In this case the facts clearly show the court was not indifferent between parties and if anything gave the appearance of being biased. Instead of scrupulously avoiding any conduct on his part which would give the appearance of being unbiased the court went out of its way to portray a contrary appearance. Naturally, such an appearance of being biased will affect the proceedings.

Further, the Kentucky Court of Appeals in the case at bar, cited Merritt v. Commonwealth, 386 S.W. 2d 727. This case held that unnecessary disclosure, from the bench in front of the jury announcing rulings, was prejudicial to the defendant and inconsistent with the right of a fair trial. Thus the highest court of Kentucky admitted this was a constitutional violation instead of an evidentiary violation.

Pursuant to the above cases read in connection with the following facts:

1. The fining of counsel by the trial court the first time without cause in front of the jury.

2. The fining of counsel by the trial court the second time without cause in front of the jury.

3. The fining of counsel by the judge in the sum of $40.00 when the law gives him only the power of $30.00 for a contempt fine.

4. The reprimanding of counsel by the trial court before the jury several times.

5. The excessive pounding of the gavel by the judge.

There is no doubt as to whether or not the defendant received a fair trial and as to whether the issue has been raised and that this is a federal question which the Supreme Court should hear.

In Henry v. Mississippi, 379 U.S. 443 and Jackson v. Dennoi, 378 U.S. 368, the Supreme Court held that constitutional defenses are not waived.

If the facts in this case present a federal question as distinguished from an evidentiary question the court acted very improperly in denying petitioner relief on the state level.

There is no doubt that matters such as confessions, right to counsel, and illegal search questions are constitutional questions while on the other hand matters such as character, witnesses, leading questions, and authenticity of pictures are evidentiary matters.

In our case we must decide if this is an evidentiary or constitutional question. We contend this is a constitutional question and therefore the issue does not have to be preserved for review. What can be more fundamental than the conduct of the judge in a court room before a jury. The egregious conduct of the court was of such a nature as to deny defendant his

fundamental rights to a fair trial and effective counsel.

Also, the question is of such public interest that the Supreme Court would be justified in ruling on this question as to what is fundamental and what is evidentiary.

Gideon vs. Wainwright, 372 U.S. 335 Doctrine briefly states an accused is entitled to an attorney in felony cases.

In our present case it is admitted the accused had an attorney; however, we contend the court prevented the defendant from having "effective assistance of counsel". The Kentucky Court of Appeals, although admitting the court acted improperly, refused to grant the appellant relief because of the fact that the record was not properly preserved for appellate review. The trial judge prohibited counsel from objecting further.

The facts indicate that the conduct of the court was so manifestly unfair on its face that it was impossible for counsel to be effective. When an attorney is harassed in the manner which counsel was harassed by the court, such counsel cannot effectively represent his client.

Gideon vs. Wainwright, supra, intention was to give defendants in criminal cases equal protection of the law regardless of their wealth. The intention and desire in this case was to give an accused effective assistance of counsel.

It is not the responsibility of defendants to preserve the record for appellate review. After all, de-

fendants are not attorneys. So, therefore, should an accused be penalized because his attorney can not protect the record?

In both Miranda vs. Arizona, 384 U.S. 436, and Escobedo vs. Illinois, 378 U.S. 478, as well as in Gideon vs. Wainwright, supra, the court is concerned with bringing justice to all, not just the few.

The court in these cases continuously emphasizes the role of an attorney in protecting the rights of the accused effectively. The court appears to be maintaining the position that unless the accused is aware of his rights, and has his rights effectively protected, he is being denied due process of law.

The question now presented is as to whether or not the accused in this case had his rights "effectively protected". The answer is obviously no. On the one hand the court prevented defense counsel from adequately protecting his client's rights and on the other hand the highest court in Kentucky held that the court's conduct probably prejudiced the accused but because of his lawyer's failure to preserve the record they deny the defendant relief.

Any way you look at it, the defendant's rights and the defendant's interest were not in keeping with the doctrine established by Gideon vs. Wainwright, supra.

Also, the Jackson vs. Dennoi, supra, doctrine was violated. There, the court was not concerned with whether or not timely legal motions were made, but instead, was concerned with the substantive aspects

of the case instead of the procedural ramifications. Both in Jackson vs. Dennoi and in this case, constitutional issues are involved.

This court is constantly expanding the Gideon doctrine. This has been especially true in confession cases. The court realizes there is little good in providing counsel after the defendant's basic rights have been violated. This court has also ruled on the right to counsel during preliminary hearings, and on appeal.

The intention of the Gideon case was to provide a person with legal representation so that all of his rights would be protected. In this case the facts must be ruled on in light of the Gideon Doctrine. At least in the Gideon case the court did nothing to hurt the accused. The court did not help the accused but did not turn the jury against the defendant. The conduct of the court in the case at bar was far worse than in the Gideon case.

In order for an accused to have equal protection of the law, he should have a fair trial and a right to effective assistance of counsel.

It is a denial of equal protection of law when two appeals are forwarded to a court and one is heard because the technical procedure is followed while in another case because of a minor procedural defect the appeal is rejected.

The Kentucky Court of Appeals has been villianous in this respect. Recently, in the Kentucky case of Shirley vs. Commonwealth of Kentucky, 413 S.W. 2d 627 the Court of Appeals dismissed an appeal because of unbelievably strict technicalities. In that

case the notice of appeal said that appellant is appeal-from an order overruling a motion for a new trial instead of asserting that appellant is appealing from a judgment. Also the Kentucky Court of Appeals did this recently in the case of Palsgove vs. Kentucky for the same reason. The later opinion is unreported.

Counsel believes it is high time the Supreme Court does away with such above absurdities and demands compliance with the Gideon vs. Wainwright case. The court should hold that cases be determined on merits and not procedure.

Thus the doctrine set in Gideon vs. Wainwright will be properly expanded.

CONCLUSION

It is our contention for the above reasons and for the error in the decision of the Kentucky Court of Appeals the Supreme Court should agree to hear this case.

Respectfully submitted,

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DAVID KAPLAN
STUART L. LYON
JAMES N. WEBB

APPENDIX

Jesse TAYLOR, Jr., Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Court of Appeals of Kentucky.

Feb. 10, 1967.

Rehearing Denied May 5, 1967.

CLAY, Commissioner.

Appellant was found guilty of indecent and immoral practices and sentenced to five years in prison. He raised two questions on appeal.

During the course of the trial, when appellant's attorney was cross-examining one of the prosecution's witnesses, the trial judge in the presence of the jury twice reprimanded the attorney and fined him for contempt of court. It is contended that the court's conduct was improper and was highly prejudicial to appellant.

In examining the cold record before us, it appears the action of the court, particularly the fining of the attorney in the presence of the jury, may have created an atmosphere so unfavorable to appellant as to have constituted reversible error, provided the question had been preserved for appellate review. See Merritt v. Commonwealth, Ky., 386 S.W.2d 727.

However, the objection appellant now raises was not presented to the trial court and must be deemed waived. Appellant did not object to the alleged misconduct nor did he request any curative relief at the time it occurred or at any time during the trial. See Taylor v. Commonwealth, Ky., 403 S.W.2d 713. As-

suming the alleged misconduct was of such character that appellant's counsel was not required to make an objection (and further prejudice his client's position) at the time of the occurrence, certainly the question should have been raised in a motion for a new trial. Although such a motion was filed and one of the grounds was "the court should have declared a mistrial during the proceedings", this still did not specify the alleged error. It is fundamental that we will not review a case for an alleged error of this nature that is never called to the trial court's attention for a ruling. See Collins v. Commonwealth, Ky., 297 S.W.2d 54; Young v. Commonwealth, Ky., 335 S.W.2d 949; York v. Commonwealth, Ky., 395 S.W.2d 781. The alleged error is not before us for review.

The other contention of appellant is that the trial court erred in failing to advise the wife of appellant, who appeared as a prosecution witness, that she could refuse to testify against him. KRS 421.210(1) provides (among other things) that neither spouse may be *compelled* to testify for or against the other. Here again appellant failed to raise this question by objection or otherwise. In any event, we know of no reason or authority which would require the court to admonish a witness as appellant proposes. See York v. Commonwealth, Ky., 395 S.W.2d 781.

The judgment is affirmed.

WILLIAMS, C. J., and PALMORE, MONTGOMERY, MILLIKEN, STEINFELD and OSBORNE, JJ., concur.

David Kaplan, Stuart L. Lyon, Louisville, for appellant.

Robert Matthews, Atty. Gen., George F. Rabe, Asst. Atty. Gen., Frankfort, for appellee.